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No. 85-2125

In the Supreme Court of the United States

OCTOBER TERM, 1986

AARON MAGIDOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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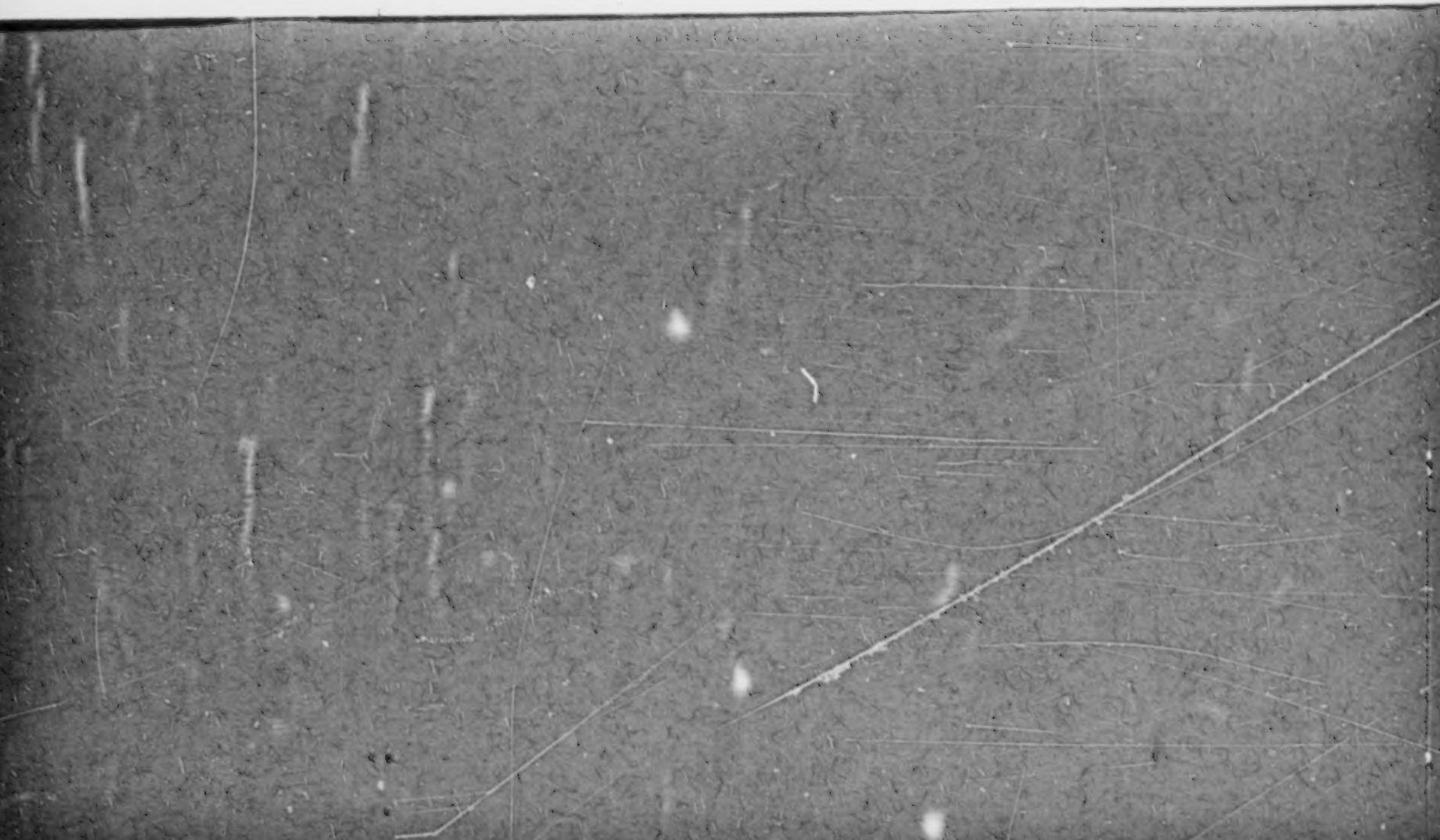

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Petitioner contends that the prosecutor impermissibly coerced a former co-defendant not to testify for the defense and that the trial court erred in refusing to instruct the jury that the prosecutor's coercive conduct could be interpreted as reflecting her belief that the government had a weak case.

1. Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 22 counts of mail or wire fraud, in violation of 18 U.S.C. 1341 and 1343 (E.R. 88-90, 180).[1] He was sentenced to concurrent prison terms of two years on Counts 7 to 10, 12 to 19, and 21, and to five years' probation on Counts 32 to 39 and 42 (E.R. 181). The court of appeals affirmed in an unpublished memorandum opinion (Pet. App. A1-A10).

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[1] "E.R." refers to the Excerpt of Record filed by petitioner in the court of appeals.

The evidence at trial showed that over a period of almost three years, petitioner participated in a series of "bust-out" bankruptcy schemes involving insolvent corporations in the meat-packing industry. Three meat trading companies were involved in carrying out the scheme: Alaska California Meat Company, Cincinnati By-Products Co., and Distribution Consolidators, Inc. (DCI). Each company operated in a similar manner: generating false credit references; purchasing carload quantities of meat by telephone on open credit terms; selling the meat at below cost; making false representations to creditors about forthcoming payments; and ultimately going bankrupt. Petitioner's principal role in the scheme was to purchase the meat below cost and then resell it at a substantial profit. Pet. App. A2-A4; 14 Tr. 1650, 1661-1665; 20 Tr. 2851, 2854; 25 Tr. 3957; 26 Tr. 4172-4174; 27 Tr. 4318, 4327.

The illegal activity involving DCI was charged in Counts 32 to 44 of the indictment. Ross Berton, a DCI official, was originally charged in Counts 40-44 of the indictment. Prior to petitioner's trial, Berton pleaded guilty to Count 41 and was awaiting sentencing. As part of his plea agreement, state prosecutors agreed not to prosecute Berton for drawing bad checks on DCI's account, provided that Berton received a prison sentence on the federal charges. Pet. App. A7 & n.6; E.R. 19-25.

2. During a recess in the trial, the lead prosecutor on the case telephoned Berton's attorney, Mike Bourbeau, to discuss Berton's availability for interviews by the prosecution, and to inquire whether Berton intented to testify for petitioner. The prosecutor told Bourbeau that she expected Berton to testify truthfully and not to shade his testimony to help petitioner. She advised Bourbeau that Berton's testimony could incriminate him in the suspended state prosecution involving the DCI checks and that Berton's federal sentence would be affected if he testified falsely. Based upon

his conversation with the prosecutor, Bourbeau advised Berton to assert his Fifth Amendment privilege if he were called to testify. Pet. App. A7.

Petitioner subsequently learned about the prosecutor's conversation with Bourbeau. Contending that the prosecutor had intentionally suppressed evidence and obstructed justice, petitioner moved for dismissal of the indictment with prejudice (28 Tr. 4403-4404, 4464). At a hearing outside the presence of the jury, Berton said he would assert his Fifth Amendment privilege if he were questioned about his activities concerning DCI (*id.* at 4410-4413). Bourbeau then testified concerning his conversation with the prosecutor (*id.* at 4416-4444, 4456-4459). The prosecutor gave her version of the conversation to the court (*id.* at 4447-4455, 4461-4463)[2] and also offered to obtain permission from the Department of Justice to grant Berton use immunity to overcome his Fifth Amendment claim (id. at 4477-4479, 4490-4491).

The district court took a sealed proffer of Berton's testimony in camera (see 28 Tr. 4479) and determined that Berton's testimony was relevant and favorable to the defense (31 Tr. 5083). The court then denied petitioner's motion to dismiss the indictment, but permitted Bourbeau to testify before the jury about his conversation with the prosecutor (28 Tr. 4484).[3] Although the court concluded that the prosecutor's conduct was "not appropriate" (*ibid.*),

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[2]The court did not require the prosecutor to take the stand, but offered to pose questions, if appropriate, that were tendered by the defense. The defense objected to the procedure and declined to pose any questions. 28 Tr. 4445, 4459.

[3]It should be noted that, wholly apart from the government's granting of use immunity to Berton, Berton's attorney testified at trial that Berton could possibly have testified to some aspects of the DCI scheme without incriminating himself (28 Tr. 4572-4573).

it refrained from ruling that the prosecutor had deliberately attempted to dissuade Berton from testifying (*id.* at 4485).

The following court day, the prosecutor obtained authorization to grant Berton use immunity under 18 U.S.C. 6002 and 6003 (29 Tr. 4667; see also 30 Tr. 4899). Petitioner nonetheless chose not to present Berton as a witness.

At the end of the trial, petitioner asked the court to instruct the jury that the prosecutor's phone call to Bourbeau violated the rules of the court and that the jury could find that such an attempt to suppress evidence demonstrated the weaknesses in the government's case and the government's consciousness of those weaknesses (E.R. 50-53). The court did not give the proposed instruction. The court, however, did instruct the jury that if it believed that the government had attempted to persuade a witness not to testify in the case, it could consider that evidence "as a circumstance tending to show the government's consciousness of the weakness of its case" (33A Tr. 22).

3. Following his conviction, petitioner moved for a new trial, claiming that the prosecutor's conduct had deprived him of Berton's testimony. The district court denied the motion, ruling that "the government did offer immunity to Mr. Berton so that he could have testified * * *. [C]ounsel apparently elected as a trial tactic not to call him for whatever [the] reasons were." 8/19/83 Tr. C-110; see also 31 Tr. 5083-5084.

The court of appeals affirmed (Pet. App. A1-A10). It held that the prosecutor's conduct, although "ill-advised" (*id.* at A8), did not deprive petitioner of Berton's testimony, because the record did not establish that Berton was unavailable to testify for the defense (*id.* at A9). The court rejected without discussion petitioner's challenge to the jury instruction concerning the prosecutor's conversation with Berton's attorney.

4. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

a. Petitioner contends (Pet. 13-19) that the prosecutor deprived him of Berton's testimony by warning Berton's attorney about the adverse consequences of untruthful testimony by Berton. That contention is without merit.

A criminal defendant, of course, has the right to secure witnesses in his own behalf, *e.g., Webb* v. *Texas*, 409 U.S. 95 (1972), and a prosecutor obviously may not coerce a witness not to testify for the defense. In this case, however, even assuming that the prosecutor's phone call to Berton's attorney was somehow coercive (a point we do not concede), any impropriety was remedied by the prosecutor's later agreement to give Berton use immunity. A grant of use immunity for Berton removed any risk that Berton might incriminate himself if he testified for the defense. See, *e.g., United States* v. *Lord*, 711 F.2d 887, 890-892 (9th Cir. 1983). See also *Kastigar* v. *United States*, 406 U.S. 441 (1972). As the district court correctly found (8/19/83 Tr. C-110), Berton was available because of the offer of use immunity, and petitioner simply chose, as a trial tactic, not to call Berton as a witness. Thus, the record does not support petitioner's claim that Berton was unavailable to testify in support of his defense.[4]

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[4]Petitioner's reliance (Pet. 16-19) on *United States* v. *Oropeza*, 564 F.2d 316, 325 n.8 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978), *United States* v. *Thomas*, 571 F.2d 285, 288 (5th Cir. 1978), and *United States* v. *Young Bros., Inc.*, 728 F.2d 682, 690-691 (5th Cir.), cert. denied, No. 84-39 (Oct. 9, 1984), is misplaced. Those cases involved the issue of whether a formal invocation of the Fifth Amendment privilege was required before a court could declare a witness "unavailable" under Fed. R. Evid. 804. Berton was available to testify in this case because of the government's willingness to give him use immunity, and those cases are therefore inapposite.

b. Petitioner also contends (Pet. 19-22) that the court erred by refusing to instruct the jury that it could find that the prosecutor's phone call to Berton's attorney revealed that she believed the government had a weak case. That claim is patently without merit.

It is fundamental that the personal opinions of counsel—both prosecution and defense—on the strength or weakness of a case are completely irrelevant and should play no part in the case. See, *e.g.*, *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 7. The prosecutor's alleged attempt to dissuade Berton from testifying was therefore not a material issue for the jury. See generally *United States* v. *Anderton*, 629 F.2d 1044, 1047 n.2 (5th Cir. 1980) (court properly refused to instruct jury on government misconduct). As a result, petitioner was not entitled to *any* instruction relating to whether the prosecutor thought she had a weak case. Here, the district court did instruct the jury that if it believed that the government attempted to persuade a witness not to testify in the case, it could consider that fact as a circumstance tending to show the government's consciousness that it had a weak case (33A Tr. 22). That instruction was clearly a windfall to petitioner. Petitioner has cited no case law to show that he was entitled even to the instruction given by the court, let alone to anything more.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986